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ABSTRACT

Reviewed in the paper is the application of due process to special education, and provided is an overview of state statute safeguards. Federal court cases, congressional actions, and state legislature measures are cited to describe the evolution of due process implications to the handicapped. Trends in state requirements are analyzed, and adherence to a traditional, judicially-created due process model is noted. It is suggested that most procedures do not provide for adequate parent involvement through informal discussion, and that the means for obtaining parent representation by counsel or an advocate is not guaranteed. (CL)

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Due Process in Special Education: Legal Perspectives

Lawrence Kotin*

Introduction

The purpose of this article is to describe the application of the requirements of the Due Process clause of the Fourteenth Amendment to the decision-making process in the area of special education. This description will begin with a discussion of the general meaning of "due process", will review the principal developments in the evolution of the application of due process to special education, will provide an impressionistic overview of the due process provisions contained in state statutes and regulations and will conclude with some reflections on the future of due process in special education.

I. The Meaning of Due Process

The Due Process clause provides in relevant part that "no state shall... deprive any person of life, liberty, or property,

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without due process of law." The basic meaning of this clause is that fair procedures must be followed before a state can deny certain "important" interests of individuals.[1] In a substantial number of decisions, the Supreme Court has indicated the kinds of interests which it considers important enough to invoke the protection of the Due Process Clause. The Court has also specified the nature of those protections in various contexts. Those Supreme Court decisions most relevant to this analysis will be discussed in the next section.

Although certain traditional procedural safeguards have come to be associated with the concept of due process, that concept does not have a fixed meaning. As with other personal rights protected by the Constitution, the right to due process is premised upon a normative, philosophical idea - that of procedural fairness - but its practical application requires that it be a flexible concept, adaptable to each new context in which it is applied. Thus, for example, it must be sufficiently flexible to be applied to the diverse interests of individuals faced with a criminal or juvenile accusation,[2] discharge from government employment,[3] suspension from public school,[4] revocation of a motor vehicle license,[5] denial of a welfare benefit,[6] attachment of property[7] or some other loss of an important interest defined by the Supreme Court as within the meaning of "life, liberty, or property."

All of these areas of due process application share three common elements. The first is that the state is taking an action against an individual or class of individuals; the second is that the action of the state threatens to deny an individual's interest in "life, liberty, or property;" and the third is that there is a dispute between the individual and the state concerning the validity of that threatened denial.

The purpose of the application of the Due Process Clause is not to prevent the denial of individual interests by the state. Rather, it is to insure that such denial will occur only after rational criteria are applied in a rational manner to facts which are proved through a process which guarantees to the individual whose interests are threatened, a reasonable opportunity to challenge adverse evidence and to argue that the interest involved should not be denied.

Some of the traditional elements of due process are the right to notice that one's interests are threatened with denial, an opportunity for a hearing on such threatened denial, an opportunity at that hearing to be represented by counsel, to present evidence, to call witnesses, to confront and cross-examine adverse witnesses, to have an impartial decision-maker and to have a specific decision based upon the application of known criteria to the facts which have been proved. In addition, there are a variety of other procedural safeguards which are

associated with due process and which apply in specific contexts, such as, the right of an indigent criminal defendant to a free trial transcript for purposes of appeal.[8] The following section describes how, from a legal perspective, the various procedural safeguards guaranteed by the Due Process Clause have come to be applied to the area of special education.

II. The Evolution of the Application of the Due Process Clause to Special Education

The application of the concept of due process to special education has resulted from a variety of developments in the federal courts, Congress, state legislatures and state rule-making bodies, such as state departments of education. The following discussion will highlight some of the most important of these developments.

A. The Federal Courts

1. Cases in the areas of criminal and juvenile law

The most extensive judicial application and definition of the concept of due process has occurred in the area of criminal law. This is because individuals charged with crimes are threatened with the loss of the most basic, personal rights - "life" and "liberty". In its decisions in the area of criminal law, the Supreme Court has specified a variety of procedural protections which must be accorded to criminal defendants, including notice of constitutional rights at various stages of the

proceedings,[9] counsel,[10] and a transcript of the proceedings for purposes of appeal.[11]

Significant for purposes of this analysis, is the Court's decision in the landmark case, In Re Gault,[13] that some of the procedural protections guaranteed to adult criminal defendants by the Due Process clause must also be provided to children and youth charged with juvenile offenses. In so ruling, the Court recognized the fact that the authority of the state, based upon the doctrine of parens patriae,[13] although broad, was not unlimited. Thus, the Court placed children and youth under the protective umbrella of the Due Process clause for purposes of juvenile delinquency proceedings.

2. Cases involving the substantive rights of public school students

Equally important as a precursor to the ultimate application of the Due Process clause to special education were the decisions of the Supreme Court applying the protections of the First Amendment and the Equal Protection clause of the Fourteenth Amendment to public school students.[14] In West Virginia State Board of Education v. Barnette,[15] for example, the Court declared that the protections of the Freedom of Speech Clause of the First Amendment applied to public school students in the schoolhouse. In the later case of Brown v. Board of Education,[16] the Court applied the Equal Protection Clause of the Fourteenth

Amendment to students in racially segregated public schools. As in Barnette, the Court in Brown announced a major area of application of the protection of the Constitution to public school students. In a recent case, Tinker v. Des Moines Independent School District,[17] the Court reaffirmed its earlier holding in Barnette and gave wide scope to the First Amendment protection contained in the Barnette decision. Thus, in Barnette, Brown and Tinker, the Court made it clear that the substantive protections of the First and Fourteenth Amendments applied to public school students in the school environment.

3. Cases involving the procedural rights of public school students

The application of due process safeguards to children and youth, articulated in the Gault decision, and the application of specific Constitutional protections to public school students declared in Barnette, Brown and Tinker converged in the recent decision of the Supreme Court in Goss v. Lopez, where the Court applied the procedural safeguards of due process to public school students faced with suspension from school. In Goss, the Supreme Court gave recognition to a large number of lower federal court decisions of the previous decade, namely, that the threat of denial of an educational opportunity to a public school student through the process of a disciplinary suspension was of sufficient gravity to require the application of the safeguards of the Due Process clause.[19] Specifically,

the Court held that a suspension for ten days or less without "procedural due process," was a denial of "liberty or property" within the meaning of the Due Process clause of the Fourteenth Amendment.[20]

The Court was careful to emphasize that the threat of such a "short term suspension," although of sufficient importance to involve the prohibition of the Due Process Clause, was not so serious as to require application of the full panoply of formal due process procedures.[21] Thus, the Court held that in the case of suspensions for ten days or less, the school authorities were only required to give oral notice to the student of the reason for the suspension and to allow the student to respond in an informal manner.[22] The Court specifically reserved decision on whether more formal and extensive procedures would be required by the Due Process clause for suspension periods longer than ten days.[23]

Thus, as in Gault, the Court in its opinion in Goss, placed limits on the authority of the state under the doctrine of parens patriae by requiring specific due process safeguards to be observed by the state in the area of disciplinary suspensions. The Court, however, has not yet ruled on the applicability of the Due Process clause to the threatened exclusion of a student from school for reason of "mental, physical or emotional handicap" rather than for "disciplinary" reasons. Several lower federal courts have ruled on this issue,

and some of these rulings will be discussed in the next subsection.

4. Cases involving the procedural rights of public school students threatened with exclusion from public school or placement on the basis of "mental, physical or emotional" handicap

The cases discussed in this subsection are those which involve the exclusion of children from either a public school or a publicly financed education for reasons of "mental, physical or emotional" handicap. Although there have been a number of federal cases litigated on this issue,[24] this analysis will focus, for purposes of illustration, on the landmark consent decrees[25] in Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania (PARC) and Mills v. District of Columbia Board of Education.[27]

The PARC case was a class action brought on behalf of all mentally retarded children in Pennsylvania who were excluded from a public school education because they were determined by Pennsylvania school officials to be "uneducable and untrainable."[28] The Mills case was brought on behalf of seven handicapped children who alleged that the Washington, D.C. school board was excluding them from public school and/or denying them a publicly supported education.[29] In both cases, the plaintiffs alleged a denial of rights guaranteed to them by the Due Process and Equal

Protection Clauses of the Fourteenth Amendment. In both cases, the federal courts approved consent decrees which acknowledged such denials and specified elaborate procedural protections to govern the placement or denial of placement of the plaintiff-children into educational programs.

Of particular relevance to this analysis are the extensive procedural safeguards provided for by the consent decrees in both cases.[30] With minor differences between them, the Courts required the following procedural protections to be offered to the parents and children prior to the placement or denial of placement into educational programs: 1) notice of the proposed action; 2) the right to a hearing prior to final action; 3) the right to counsel at that hearing; 4) the right to present evidence; 5) the right to full access to relevant school records; 6) the right to compel attendance of, confront and cross-examine officials or employees who might have evidence on the basis for the proposed action; 7) the right to an independent evaluation; 8) the right to have the hearing open or closed to the public, at the option of the parent; 9) and the right to an "impartial hearing officer."[31] In addition, the decrees required that the hearings be held at a place and time convenient to the parents, that the hearing be recorded, transcribed and made available to the parents, upon request; and that the decision of the hearing officer contain specific

findings of fact and conclusions of law.[32]

In summary, the consent decrees in PARC and Mills provided for extensive and detailed procedural safeguards to protect the rights of children being classified on the basis of mental, physical or emotional handicaps. Most of these safeguards are familiar to courts and have been applied in other contexts. Others, such as the right to an independent evaluation and the right to access to school records, are of particular relevance to the public school setting.

The basic elements of due process delineated in PARC and Mills gradually began to be recognized in other states through federal court decisions or through state legislation, but the great impetus for the application of due process to special education came through the requirements of federal legislation which will be discussed in the next subsection.

B. Congressional Action

On August 21, 1974, President Ford signed the "Education of All Handicapped Children Act"[32] which applied the major procedural safeguards articulated in Mills and PARC to all states which wished to receive federal funds under the Act. Since the Act is a major potential source of federal funds for the education of handicapped children by the states, its requirements will undoubtedly be met in every state of the Union.

Of particular importance to this analysis is the Act's state plan requirements relating to due process.[34] Under these requirements, each state seeking funds under the Act must submit to the United States Commissioner of Education a state plan which contains "procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children."[35] These procedures must include many of the provisions specified in PARC and Mills including provisions for 1) notice to parents or guardians of a change in the educational placement of the child; 2) the right to an "impartial due process hearing"; 3) the right to access to all relevant school records; 4) and the right to an independent evaluation.[36] In addition to being required in the state plan requirements, these basic procedural protections are set forth as mandatory provisions of the Act, itself.[37] In addition to what is described above as being required in the state plan, the Act requires that parents be given the right to appeal to the state educational agency, whenever the initial due process hearing has been conducted by the local educational agency rather than by the state.[38] Furthermore, the Act specifies the detailed format of the "due process hearing" requiring that any party to the hearing shall

be accorded:

> (1)the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2)the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3)the right to a written or electronic verbatim record of such hearing, and (4)the right to written findings of fact and decisions...[39]

Finally, the Act provides for review of final administrative decisions "in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."[40] Thus, the Act establishes a basis for cases of exclusion or misclassification of students on the basis of "mental, physical or emotional handicap" to be heard by the federal as well as the state courts.

The cumulative effect of the federal litigation and legislation described above is a great deal of activity at the state level in requiring local educational agencies to implement due process procedures in their special education programs. This activity at the state level will be discussed in the next section.

III. State Response to Federal Judicial and Legislative Requirements in the Area of Due Process in Special Education

At the time the "Education of all Handicapped Children Act" was signed into law, the Council for Exceptional Children estimated that twelve states had legislation containing references to due process requirements in special education and that thirteen

states had regulations containing such requirements.[41] A review of current state legislation and regulations reveals that twenty-three states now have statutory special education due process provisions[42] while virtually every state has due process requirements for special education specified in state regulations, binding state plans submitted under the "Education of All Handicapped Children Act," state guidelines or proposed regulations or guidelines which are in various stages of the state administrative process.[43]

The following analysis will provide an impressionistic overview of the kinds of due process requirements for special education which are being developed by the states. Because these state requirements have been developed so recently and at such a rapid pace, because they are in various stages of completion, and because it is unclear in many states whether or not what has been developed is legally binding or is merely advisory in nature, it has been impossible to secure and to present a precise and detailed description of the special education due process system in each state. For this reason, the following analysis uses the material which has been received from the various states only to indicate trends which appear to be developing and to highlight unusual or infrequently encountered requirements.

A. General Trends

The most typical state system for due process in special education is one which begins with a notice to parents that their child has been referred for an evaluation.[44] Frequently, this notice contains a requirement of parental consent to the conduct of the evaluation.[45] In many states, if the parent refuses to consent, the local educational agency may appeal such refusal to the state education agency.[46] The implication of this appeal right is that the state education agency has the authority to affirm or reverse the parental decision, but the type of state action which, in fact, may be taken, is generally unspecified.

Assuming the receipt of parental consent, the next place where the parent is involved in the typical state system is after a decision has been made by an "evaluation team" of educational and other professional diagnosticians about a proposed placement for the child. At this point, the parent is sent a notice of the decision and of their "due process right" to contest that decision at a formal hearing.[47]

In the usual case, such hearing is provided at the local level.[48] It is typically presided over by a designee of the local education agency. In many states, provision is made for an impartial hearing officer" - i.e., a person who is not an official, employee or agent of the local educational agency which made the original placement decision.[49]

Most states provide for the full range of procedural protections at the hearing. For example, most systems allow the parents to be represented by counsel, to have full access to all relevant school records, to present evidence, to compel the attendance of, confront and cross-examine persons who were involved in making the placement decision and to have the hearing recorded.[50]

The typical state system provides for an appeal to the state education agency from the decision of the local hearing officer.[51] Usually, the scope of review at this appeal is limited to the record that was made at the initial due process hearing, although the state appeals hearing officer is frequently given the authority to require the production of more evidence if the record is inadequate for a decision to be made on the appeal.[52]

Most states provide for the parent to have the child "independently" evaluated prior to the initial due process hearing. Usually, this independent evaluation is available at a state facility or at state expense, although the responsibility for payment is frequently unspecified.[53]

B. Unusual or Infrequently Encountered Provisions

At least one state provides that if a parent refuses consent for the evaluation or for the placement of the child, such refusal is final and the process ends at that point.[54]

It is unclear from the provisions of this state what happens to the child in this case, particularly in situations where the referral was made by a teacher or other school employee.

Relatively few states provide for parent involvement in the decision-making process between the time of referral of the child for an evaluation and the placement decision by the evaluation team.[55] Some involve the parent in the placement decision, requiring parent presence at meetings when such decision is to be made.[56] At least one state requires involvement of the child.[57]

At least one state appears to have a one-tier administrative system with a single due process hearing and a subsequent appeal to court.[58] At least one state has a two-tier system with the first level being the state and the second a commission composed of parents and professionals.[59] At least one state gives the parents the option of an initial due process hearing either before a hearing officer appointed by the local educational agency or before a mediator appointed by the state educational agency.[60] In either case, the parent has a subsequent right to appeal to the state educational agency.

At least one state provides for two routes of appeal - one from placement decisions by local educational agencies and the other from placement decisions by non-public school "human resources" agencies. In the former case, the appeal is to the state educational agency; in the latter case, the appeal is to the state secretary of human resources.[61]

Some states provide that both the initial hearing and any appeal from the decision at that hearing be full due process hearings.[62] Thus, in those states, the appeals hearing officer conducts a complete hearing as a basic for reviewing the earlier decision. It is not specified in these states whether the record of the initial hearing can be admitted into evidence at the subsequent hearing.

None of the state provisions which were reviewed provide that parents receive, as part of the notice of a proposed placement of their child, a list of the names of agencies where free legal counsel can be obtained for purposes of representation at the due process hearing. Also, no state provides for public payment for lawyers or other advocates representing parents at due process hearings.

C. Conclusion

The due process provisions which have been developed by the states to meet federal statutory and judicial requirements are most notable because of their similarity to each other and their adherence to the traditional, judicially-created due process model. The basic elements of the due process systems of most states are an initial notice that a process has begun; a subsequent notice that the process has been completed; an opportunity for a formal "due process hearing;" and a right of appeal from the decision rendered at that hearing. The contents of the notices and the nature of the hearing and appeal,

with certain exceptions such as the right to an independent evaluation, reflect standard due process requirements.

IV. Reflections on Due Process in Special Education

The application of due process safeguards to the special education decision-making process is a very recent and relatively sudden occurrence. A review of the state statutory and regulatory provisions for defining these safeguards indicates that those provisions are in varying stages of development with few having been finally delineated. Thus, very few states have even reached the stage of implementation.

From the provisions which have been developed to date, however, it is possible to speculate about some of the issues which will be raised during implementation. In particular, the principal question which must be asked is whether the traditional due process systems which have been adopted by most states will actually achieve their purpose in the special education context.

For example, most of the systems described in this article stress the formal due process hearing and place little emphasis on parent and child involvement prior to the development of a recommendation for an educational placement. Given the importance of the involvement of the parents and child in helping to develop a special education plan, it is critical to determine whether the present approach will result in the most appropriate educational plan, and facilitate long term cooperation between the

parents and the school, as service provider, or whether it will heighten the adversarial qualities of a model which already emphasizes those qualities.

The due process model which is being developed by most states does not routinely provide for informal discussion mechanisms for the resolution of differences of opinion between the home and school. Considering the high degree of qualitative and subjective decision-making involved in a typical special education situation the usual due process model seems poorly adapted to arrive at a decision which is either rational and/or generally accepted by the school, the parents and the child, when serious differences have developed among these parties.

Another issue is whether the systems which are being adopted will provide for a sufficient equality in bargaining power between the school and the parents so that the formal due process hearings will result in an accurate reflection of the merits of a case rather than a reflection of a relative imbalance of power. For example, if a parent at a due process hearing is unrepresented by counsel or an advocate and the school system is represented by counsel, will the hearing be a dispute between equals? No states appear to be making any substantial effort to insure that the due process hearing is "fair" in the sense of having the opposing parties begin on an equal basis. Mere notice to the parent of the "right" to be

represented is without significance unless the means to obtain counsel or an advocate is made available.

A related issue is whether the due process systems which are being developed will be utilized by poor and minority group parents who, traditionally, have the greatest difficulty in participating in and securing the benefits of government programs. There is very little emphasis in any of the state systems on strong efforts to insure the participation of these parents in the special education process. Greater provision for early consultation with and personal notice to parents would remedy this omission to some degree.

It is important to point out that the formal due process safeguards which are required by federal cases and states are essential to any state system of due process in special education. The preceding discussion is not intended to cast doubt on the importance or necessity of formal due process safeguards in this area. Nevertheless, it should be recognized that these safeguards are minimum requirements and need not define the outer limits of a state system. In fact, there is a great deal of room for adding to the requirements to insure that the decision-making process in special education is not only "fair" in a legal sense, but rational in an educational sense. In addition, mandating formal procedural safeguards is not sufficient. These safeguards must also be guaranteed through a system which insures both parent involvement and parent equality in the bargaining process.

FOOTNOTES

1. See, generally, Kirp, Buss and Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals", 62 Cal. L. Rev. 40 (1974).

2. Gideon v Wainwright, 372 U.S. 335 (1963) (criminal proceeding); In re Gault, 387 U.S. 1 (1967) (juvenile proceeding).

3. Perry v. Sindermann, 408 U.S. 593 (1972).

4. Goss v. Lopez, 419 U.S. 565 (1975).

5. Bell v. Burson, 402 U.S. 535 (1971).

6. Goldberg v. Kelly, 397 U.S. 254 (1970).

7. Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337 (1969).

8. Griffin v. Illinois, 351 U.S. 12 (1955).

9. Miranda v. Arizona, 384 U.S. 436 (1966).

10. Gideon v Wainwright, 372 U.S. 335 (1963); Argesinger v. Hamlin, 407 U.S. 25 (1973).

11. Griffin v. Illinois, 351 U.S. 12 (1955).

12. In re Gault, 387 U.S.1(1967).

13. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944) where the Court defined the doctrine of parens patriae. In general, the Court said, at p.167, that under that doctrine, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."

14. For purposes of this discussion, the relevant part of the First Amendment provides that "Congress shall make no law... abridging the freedom of speech." The relevant part of the Fourteenth Amendment provides that "No state shall... deny to any person within its jurisdiction the equal protection of the laws." The quoted part of the First Amendment has been applied to the states as well as to Congress by a series of decisions of the Supreme Court.

15. 319 U.S. 624 (1943).

16. 347 U.S. 483 (1954).

17. 393 U.S. 503 (1969).

Footnotes, cont'd.

18. 419 U.S. 565 (1975).

19. Id., at 573.

20. Id.

21. Id. at 583.

22. Id. at 583 - 84.

23. Id. at 584.

24. See, generally, Abeson A. and Bolick, N., A Continuing Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children, Council for Exceptional Children, No. 8 (1974).

25. A consent decree is an agreement between the plaintiffs and defendants which has been approved by the court. Thus, in cases resolved through agreement, the court does not render a "decision" but merely approves the agreement. For this reason, some judges will not accept consent decrees as formal precedents.

26. 343 F. Supp 279 (E.D. Pa., 1972).

27. 348 F. Supp 866 (D.D.C. 1972).

28. 343 F. Supp at 282.

29. 348 F. Supp at 861.

30. 343 F. Supp. 279 at 303 - 305; 348 F. Supp. at 873 - 876.

31. Id.

32. Id.

33. Education Amendments of 1974 (P.L. 93 - 380), 20 U.S.C.§1411 et seq. (Sup., 1976)

34. Id., at §1413.

35. Id.

36. Id.

37. Id., at §1415.

38. Id.

39. Id.

Footnotes, cont'd.

40. Id.

41. "State Policy Regarding Due Process and Mainstreaming", Council for Exceptional Children (Oct. 1, 1974).

42. A chart on state statutory provisions for due process in special education is available upon request. These provisions give some indication of the due process systems in each of the states listed, but, in general, must be read together with state regulations, guidelines and state plans in order to provide a full description of the system which is in effect in a particular state.

43. For purposes of this article, references to the special education due process provisions in the various states will not differentiate between statutes, regulations, guidelines or state plans. Rather, the reference to a state system of due process in special education or to a particular part of that system will be a composite reference to the combined effect of the various sources from which the information was derived.

44. E.g., Mass., N.J., N.D., Okla., Ore., Pa., S.D. and Va.

45. E.g., N.D., Okla., S.D., Tenn. and Va.

46. Iowa, Okla. and Wash.

47. Most states provide for this post-decision notice.

48. E.g., Kan., Md., Mich. and N.J.

49. This is a provision which is common to most states.

50. Id.

51. E.g., Kan., Md., N.D., Okla. and S.D.

52. This is a provision which is common to most states which begin with a local hearing and provide for a subsequent appeal to the state education agency.

53. This is a provision which is common to most states.

54. E.g., La.

55. E.g., some states which do have such provisions are: Ariz., Mass., Mich. and N.D.

56. E.g., Mass. and N.D.

57. Mass., if the child is 14 or older and if the child is younger than 14, such involvement is at the discretion of the evaluation team.

Footnotes, cont'd.

58. R.I.

59. Mass.

60. Conn.

61. N.C.

62. E.g., Kan. and N.C.